Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers	))	WC Docket No. 17-144
	)	
Business Data Services in an Internet Protocol Environment	))	WC Docket No. 16-143
	)	
Special Access for Price Cap Local Exchange Carriers	))	WC Docket No. 05-25

COMMENTS OF CENTURYLINK

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COMMENTS OF CENTURYLINK

CenturyLink, Inc.[1] hereby files these comments on the Commission's proposal to adopt, on remand, the same TDM transport rule it established in the *BDS Order*,[2] forbearing from ex ante pricing regulation of price cap carriers' TDM-based transport business data services (BDS).[3] The Commission should adopt this proposal.

[1] This submission is made by and on behalf of CenturyLink, Inc. and its wholly owned subsidiaries.

[2] *Business Data Services in an Internet Protocol Environment*, WC Docket Nos. 16-143 *et al.*, Report and Order, 32 FCC Rcd 3459, 3500-02 ¶¶ 90-92 (2017) (*BDS Order*), *remanded in part sub nom.*, *Citizens Telecomms. Co. of Minn.*, *LLC v. FCC*, 901 F.3d 991 (2018), *mandate stayed until* Nov. 12, 2019 (Order, 8th Cir. Nov. 9, 2018) (Nos. 17-2296 *et al.*) (*Stay Order*).

[3] As reflected in the *Notice* and the Commission's rules, price cap carriers' TDM transport services include both interoffice transport and non-end user channel termination services. *See* 47 C.F.R. § 69.801 ("*Transport* includes interoffice facilities, channel terminations between the serving wire center and point of presence, and all special access services that are described in §69.114 other than end user channel terminations."); *see also Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers*, WC Docket Nos. 17-144 *et al.*, Report and Order, Second Further Notice of Proposed Rulemaking, and Further Notice of Proposed Rulemaking, FCC 18-146, at ¶ 147 & n. 369 (rel. Oct. 24, 2018); 83 Fed. Reg. 61358 (Nov. 29, 2018); Erratum, WC Docket Nos. 17-144 *et al*. (rel. Dec. 11, 2018) (*Notice*). These Comments, initially due January 14, 2019, are being filed today in accordance with the FCC's January 29, 2019 Public Notice, Revisions to Filing and Other Deadlines Following Resumption of Normal Commission Operations, DA 19-26.

I. INTRODUCTION AND SUMMARY

In the *BDS Order*, the Commission updated its regulation of price cap carriers' DS1, DS3, and other business data services to reflect the realities of today's telecommunications marketplace. Demand for DS1s and DS3s has been declining for years, as customers migrate to Ethernet and other packet-based services that are easily scalable to meet their growing bandwidth needs. These packet-based services are available from a long list of facilities-based national and regional providers. By 2013, 92.1 percent of buildings with BDS demand in price cap territories were within a half mile of competitive fiber transport facilities.[4] This broad presence of competitive fiber, along with cable companies' ubiquitous hybrid-fiber coaxial (HFC) deployments, have resulted in steadily declining prices.[5]

The Commission recognized in the *BDS Order* that its rules had failed to keep pace with these trends. Indeed, the Commission was applying the same rules to TDM-based BDS in 2017 as it had in 2000, despite the explosive growth of non-ILEC fiber investment and packet-based services during the interim. And, while the 1999 *Pricing Flexibility Order*[6] permitted pricing flexibility for TDM-based BDS in some areas, it still subjected those services to price cap regulation in some of the country's largest and most competitive cities and required these services to be offered via tariff in all areas.

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[4] *BDS Order*, 32 FCC Rcd at 3501 ¶ 91.

[5] *Id.*, 32 FCC Rcd at 3491-93 ¶¶ 70-73; Atlantic-ACM, *U.S. Telecom Wireline and Wireless Sizing and Share Forecast: 2018-2023* at 80 (Oct. 2018) (*Atlantic-ACM 2018-2023 Forecast*) ("Cable companies' Ethernet offering expansion represents a substantial competitive threat in the access market, driving incumbents to significantly price down services to keep pace [emphasis omitted.]")

[6] *See generally Access Charge Reform*, CC Docket Nos. 96-262 *et al.*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) (*Pricing Flexibility Order*).

In the *BDS Order*, the Commission found such monopoly-era regulation to be "of limited use – and often harmful – in a dynamic and increasingly competitive marketplace[,]" potentially interfering with the natural evolution to packet-based services.[7] It therefore established a new regulatory framework for BDS services based on its review of the 2015 Data Collection and a careful balancing of the costs and benefits of ex ante pricing regulation. Except in limited circumstances, this new framework relies on facilities-based competition and, if necessary, recourse to the Commission's enforcement processes to discipline rates for price cap carriers' TDM-based BDS, rather than cumbersome tariffing and price cap regulation. The Commission also maintained its longstanding policy of regulating TDM transport services more lightly than TDM channel termination services, given that "transport service represents the 'low-hanging fruit' of the business data services circuit, which makes it particularly attractive to new entrants."[8] The Commission thus freed price cap carriers' BDS from ex ante pricing regulation, except for the small portion of TDM end user channel termination services provided in counties not meeting the *BDS Order*'s competitive market test.

On appeal, the CLECs challenged numerous aspects of the *BDS Order*. Characterizing the BDS marketplace as, at best, a duopoly and generally an ILEC monopoly, the CLECs faulted the Commission for counting "nearby potential competitors," *i.e.*, CLECs within a half mile or cable operators in the same census block, in its market analysis and for failing to apply the "traditional market power analysis" the Commission had used in the *Qwest/Phoenix Order*.[9] The

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[7] *BDS Order*, 32 FCC Rcd at 3462 ¶ 4 (footnote omitted).

[8] *Id.*, 32 FCC Rcd at 3498 ¶ 82 (citations omitted).

[9] *See* Sealed Joint Opening Brief of Ad Hoc *et al.* and Access Point *et al.*, *Citizens Telecom. v. FCC*, Nos. 17-2296, 17-2342, 17-2685 *et al.* (8th Cir. filed Sept. 26, 2017).

Eighth Circuit rejected these arguments.[10] But the court concluded that the Commission had provided insufficient notice of its decision to eliminate ex ante pricing regulation of price cap carriers' TDM transport services on a nationwide basis and therefore vacated the Commission's TDM transport rule and remanded that issue to the Commission for further proceedings.[11] After further briefing, the Eighth Circuit granted the Commission's request to stay the court's mandate for one year (until November 12, 2019),[12] avoiding the extensive and unnecessary disruption in the BDS marketplace that would have otherwise occurred.[13]

For the reasons articulated in the *Notice*, the Commission should maintain the TDM transport rule it adopted in the *BDS Order*, exempting these services from ex ante pricing regulation on a nationwide basis.[14] Price cap carriers face substantial and widespread competition in the provision of these services.[15] According to the overly conservative estimates in the 2015 Data Collection, by 2013, 89.6% of census blocks with BDS demand had at least one served building within a half mile of competitive fiber, which is the distance the Commission concluded BDS providers could profitably invest and deploy facilities to meet BDS demand.[16] And, as the Commission found, even for the small percentage of census blocks that lack

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[10] *Citizens Telecomms. v. FCC*, 901 F.3d 991 (8th Cir. 2018) (finding the Commission's economic theory and interpretation of the evidence to be permissible).

[11] *Id.* at 1006.

[12] *Citizens Telecomms. v. FCC*, Order, Nos. 17-2296 *et al*., at 3 (Nov. 9, 2018) (*Stay Order*).

[13] Motion of Federal Communications Commission to Stay the Mandate, *Citizens Telecomms. v. FCC*, Nos. 17-2296 *et al*. (8th Cir. filed Oct. 10, 2018).

[14] *Notice*, *e.g.*, at ¶¶ 151-52.

[15] *BDS Order*, 32 FCC Rcd at 3498-99 ¶¶ 83-85.

[16] *Id.*, 32 FCC Rcd at 3482 ¶ 45, 3501 ¶ 91.

competitive transport options, the threat of competitive entry will prevent price cap carriers from charging supracompetitive rates.[17]

These market dynamics are even more pronounced today. Cable companies have evolved from new entrants to established providers of BDS, focusing on expanding their fiber networks and increasing the capability of their ubiquitous HFC networks. Fiber-based CLECs, such as Zayo, also continue to enjoy increased revenues and expand their fiber networks. This competition is largely driven by the continuing migration from price cap carriers' TDM services to Ethernet and, increasingly, dark fiber, which is available from cable companies, CLECs, infrastructure providers, and via self-provisioning. Given this record, the Commission should adopt its proposal to preserve the *BDS Order*'s elimination of ex ante pricing regulation of price cap carriers' TDM transport services.

To avoid wasteful and unnecessary disputes, the Commission also should confirm the continuity between the *BDS Order*'s TDM transport rule and a materially identical rule it adopts on remand. Assuming the latter is put in place by November 12, 2019, price cap carriers' TDM transport rules will have been free of tariff and price cap regulation (but subject to continued *ex post* oversight under Sections 201, 202, and 208) from the effective date of the *BDS Order* going forward. The Commission should make clear that even when the court's November 2019 vacatur takes effect, the vacatur will be moot – *i.e.*, it will not change any party's rights or responsibilities either retrospectively or going forward – because the Commission will have cured the procedural defect identified by the court before the court's mandate issued. Indeed, the *Stay Order* effectively drove this result by allowing the Commission to replace the *BDS Order*'s TDM transport rule prior to the issuance of the court's mandate vacating that rule. A contrary

[17] *BDS Order*, 32 FCC Rcd at 3502 ¶ 92.

interpretation (under which the November 2019 vacatur somehow alters rights and responsibilities of price cap carriers or their enterprise customers in the period before the vacatur issued) would result in the "needless expense, effort, and uncertainty for the FCC and providers and customers of business data services (BDS)[]" that the stay was intended to avoid.[18]

Nevertheless, given their opposition to the Commission's stay request, one or more CLECs may dispute price cap carriers' transport rates for the period between the *BDS Order* and the effectiveness of the TDM transport rule adopted on remand. The Commission therefore should verify that the price cap carriers' TDM transport services have been exempt from price cap and tariff obligations since the *BDS Order* became effective. And, to remove any doubt, the Commission also should confirm that, in the event of any subsequent challenge, it would view price cap carriers' market rates for these services as lawful under Sections 201 and 202, without regard to price cap regulation, given its findings in 2017 and today that those services are subject to effective competition on a nationwide basis.

II. TRANSPORT SERVICES HAVE LONG BEEN A FOCUS OF COMPETITIVE ENTRY AND INVESTMENT.

Since the advent of price cap regulation in 1990, price cap carriers have separately priced, and the Commission has separately regulated, end user channel termination services (*i.e.*, channel terminations between a LEC end office and a customer premises) and transport services (*i.e.*, entrance facilities, direct-trunked transport, channel mileage, and the flat-rated portion of tandem-switched transport).[19] And, in the *Pricing Flexibility Order*, the Commission applied less stringent regulation to BDS transport services, recognizing that these services "all involve

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[18] *See* Corrected Reply of Federal Communications Commission in Support of Motion to Stay the Mandate, *Citizens Telecomms. v. FCC*, Nos. 17-2296 *et al.*, at 1 (8th Cir. filed Oct. 29, 2018).

[19] *See Pricing Flexibility Order*, 14 FCC Rcd at 14227 ¶ 10.

carrying traffic from one point of traffic concentration to another[]" and can be used to provide service to more than one end user.[20] Thus, "entering the market for these services requires less investment per unit of traffic than is required . . . for channel terminations between an end office and customer premises."[21] Competitors therefore are likely to enter the market to provide transport services before doing so for end user channel terminations.[22] Accordingly, the Commission adopted a higher threshold for granting pricing flexibility for the latter.[23]

The Commission reasonably maintained this bifurcated regulatory framework in the *BDS Order*, once again noting that transport services "are typically higher volume services between points of traffic aggregation[,]" which "require[] less investment per unit of traffic than required for channel terminations."[24] Thus, transport service represents the "'low-hanging fruit'" of business data services that "more easily justify competitive investment and deployment."[25] These services sometimes carry data between price cap carriers' end offices but are also used to carry traffic between other points of aggregation as well.[26] Competitors may replicate portions of a price cap carrier's transport network by collocating in its end office, while other times bypassing the price cap carrier's network altogether by terminating their transport facilities to carrier hotels, data centers, and other locations near, but not connected, to the price cap carrier's

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[20] *Pricing Flexibility Order*, 14 FCC Rcd at 14279 ¶ 102.

[21] *Id.*

[22] *Id.*

[23] *Id*.

[24] *BDS Order*, 32 FCC Rcd at 3495 ¶ 77, 3503 ¶ 96 (citations omitted).

[25] *Id.*, 32 FCC Rcd at 3495 ¶ 77, 3498 ¶ 82.

[26] *See id*., 32 FCC Rcd at 3495 ¶ 77.

network. In either case, these facilities compete with price cap carriers' transport services and discipline the rates for those services.

III. PRICE CAP CARRIERS' TDM TRANSPORT SERVICES ARE SUBJECT TO INTENSE COMPETITION.

The 2015 Data Collection confirmed that price cap carriers' TDM transport services were subject to intense competition in 2013, even without fully accounting for cable providers' dramatic growth in enterprise services. That competition has only accelerated over the past five years.

In the *BDS Order*, the Commission found that TDM transport services, and especially low-capacity DS1s and DS3s, had been eclipsed by packet-based transport services, which BDS purchasers clearly view as a competitive substitute.[27] By 2013, competing transport networks were nearly ubiquitous. Competitors had deployed competing transport networks to 95% of census blocks with BDS demand, collectively containing 99% of business locations.[28] Indeed, 92% of locations with BDS demand were within a half mile of competitive transport facilities, excluding HFC facilities.[29] A number of major markets had as many as 28 competitive transport providers.[30] This competitive entry had occurred despite the fact that the bulk of price cap carriers' BDS transport had been free from price cap regulation since the early 2000s.[31]

Yet, as the Commission recognized in the *BDS Order*, the 2015 Data Collection provided an overly conservative view of BDS competition, by failing to fully account for cable providers'

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[27] *See BDS Order,* 32 FCC Rcd at 3472 ¶ 26.

[28] *Id.*, 32 FCC Rcd at 3496 ¶ 79.

[29] *Id.*, 32 FCC Rcd at 3501 ¶ 91.

[30] *Id.*, 32 FCC Rcd at 3496-97 ¶ 79.

[31] *Id.*, 32 FCC Rcd at 3496 ¶ 79.

HFC deployment.[32] That assessment of competition is even more underinclusive today. Over the past five years, cable providers have evolved from new entrants to established providers of BDS, and competition for BDS transport and the decline of TDM transport have accelerated. According to a recent Atlantic-ACM report, "[c]able companies are leveraging [their] ubiquitous HFC and rapidly expanding fiber networks to gain share in the Wholesale Wireline access market."[33] The report notes that all major cable companies are focused on expanding their network footprints and speed offerings, and Comcast, Cox, and other cable companies are working to increase the capacities of their Ethernet over HFC offerings.[34] As a result, "[c]able companies' Ethernet offering expansion represents a substantial competitive threat in the access market, driving incumbents to significantly price down services to keep pace[.]"[35] These trends will only continue, with cable providers "expected to see share gains across markets, with continued expansion and upgrades of fiber and HFC footprint and focus on growing business and wholesale traction[.]"[36] By 2023, Atlantic-ACM projects that cable companies' collective share of wireline business revenues will reach 30.7% (as compared to AT&T, CenturyLink, and Verizon's collective 44.4% share).[37] Of course, cable companies are not the only alternatives to the price cap carriers' BDS. Fiber-based CLECs, such as Zayo, continue to increase their share of BDS revenues.[38]

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[32] *BDS Order*, 32 FCC Rcd at 3501 ¶ 91.

[33] *Atlantic-ACM 2018-2023 Forecast* at 80.

[34] *See id.* at 80.

[35] *Id*. at 80 (emphasis omitted).

[36] *Id*. at 143.

[37] *Id*. at 132, 143.

[38] *See id*. at 148.

As the Commission recognized in the *BDS Order*, this competition is largely being driven by the ongoing migration away from price cap carriers' legacy TDM services.[39] Demand for TDM-based BDS, including TDM transport, continues to fall. According to Atlantic-ACM, while legacy transport services accounted for 34.8% of business data transport revenues in 2017 (with Ethernet services accounting for the remaining 65.2%), legacy transport is expected to account for only 13.9% of those revenues by 2023.[40] For wholesale services, Atlantic-ACM expects significant declines in revenues for private line services to persist, as wholesale transport buyers continue to "shift away from legacy services towards higher capacity Ethernet and Wavelengths[.]"[41] As at the time of the *BDS Order*,[42] much of that demand is currently moving to Ethernet, but "Ethernet growth will slow as Legacy Private Line migration bases shrink and competition from dark fiber and new market entrants continues to ramp[.]"[43] Already, demand for higher bandwidth and lower latency are driving customers to dark fiber offerings, especially in the financial services, media, technology, and healthcare industries.[44] By 2023, the private networking market is forecasted to shrink by $2.8 billion, "as businesses' increasingly complex and robust requirements are addressable via more cost effective technologies, such as dark fiber

[39] *BDS Order*, 32 FCC Rcd at 3490-91 ¶ 68.

[40] *Atlantic-ACM 2018-2023 Forecast* at 57.

[41] *Id*. at 78-79.

[42] *BDS Order*, 32 FCC Rcd at 3490 ¶ 68.

[43] *Atlantic-ACM 2018-2023 Forecast* at 15.

[44] *Id*. at 41. *And see* Sean Buckley, *Zayo's Caruso: Our Fiber Assets Are Well Positioned*, Fierce Telecom (Jan. 9, 2018), available at https://www.fiercetelecom.com/telecom/zayo-s-caruso-our-fiber-assets-are-well-positioned (noting that Zayo "customers, particularly internet-facing companies, who place an initial order will come back . . . and demand more dark fiber following an initial order.")

or SD-WAN."[45] A trend of bringing traffic on-net has also dampened spending on wholesale BDS.[46]

Mobile wireless providers have also continued to increase their purchase of dark fiber as a substitute for lit cell site backhaul services, a trend that was just beginning at the time of the *BDS Order*.[47] This migration to dark fiber backhaul is being pursued by all four major wireless providers "to insulate themselves from risks associated with bandwidth consumption increases" and obtain "better management flexibility, lower latency, and a reduction in monthly costs[.]"[48] To the extent they are retaining lit backhaul services, "[w]ireless providers continue to demand more frequent and significant price reductions at the tower[,]"[49] which is consistent with CenturyLink's experience as a BDS provider. Simultaneously, mobile wireless carriers are undertaking network densification necessary for 5G. Not surprisingly, these network initiatives have resulted in intense competition among established providers, including cable companies and IXCs; fiber-based CLECs such as Zayo and Uniti Fiber;[50] infrastructure providers, such as

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45 *Atlantic-ACM 2018-2023 Forecast* at 15.

46 *See id*. at 86.

47 *See BDS Order*, 32 FCC Rcd at 3476-77 ¶ 35.

48 *Atlantic-ACM 2018-2023 Forecast* at 84.

49 *Id*. at 83 (emphasis omitted).

50 *See* Sean Buckley, *Zayo Awarded 30-Market FTTT Contract from Major Wireless Operator*, Fierce Telecom (Apr. 2, 2018), available at https://www.fiercetelecom.com/telecom/zayo-awarded-30-market-fttt-contract-from-major-wireless-operator; Uniti Group Inc. (UNIT) Q3 2018 Earnings Conference Call Transcript; UNIT Earnings Call for the Period Ending September 30, 2018, The Motley Fool (Nov. 1, 2018), available at https://www.fool.com/earnings/call-transcripts/2018/11/01/uniti-group-inc-unit-q3-2018-earnings-conference-c.aspx (noting that Uniti is leasing dark fiber routes across its footprint, "including with the largest web-scale providers, MSOs, and wireless carriers in the country.")

Crown Castle and ExteNet Systems;[51] and engineering and infrastructure firms.[52] Even if a price cap carrier has the only transport facilities connecting two end offices, that does not mean it can charge supracompetitive rates on that transport route. Given the availability of competitive transport in areas with BDS demand, competitors inevitably have nearby facilities they can profitably extend to capture this high-volume transport traffic.[53]

CenturyLink has experienced these trends as both a BDS seller and purchaser. Between 2015 and 2018, CenturyLink's ILEC revenues for TDM-based BDS of DS3 capacity and below declined by one third. Its revenues for TDM transport of the same capacities dropped 9% annually during this period. In addition to these price cap carrier operations, CenturyLink competes aggressively in other price cap carriers' incumbent service areas, in part, through its former Level 3 affiliate. That affiliate purchases from more than 100 non-ILEC providers, with those purchases making up more than half of its third-party BDS purchases. Between 2015 and 2018, CenturyLink's procurement of TDM-based transport at DS3 and below from unaffiliated providers fell an average of 10% annually. During this period, CenturyLink's Ethernet purchases grew substantially, and its purchase of dark fiber transport increased dramatically, almost exclusively through arrangements with cable companies and CLECs.

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[51] Crown Castle website, *Infrastructure Solutions: Dark Fiber*, https://fiber.crowncastle.com/solutions/infrastructure/dark-fiber (last visited Jan. 8, 2019); Natalie Gagliordi, *Tower Operator Crown Castle Buys Lightower Fiber Networks for $7.1B: The Deal Will Make Crown Castle One of the Largest Owners of Metro Fiber in the US*, ZDNet (Jul. 18, 2017), available at https://www.zdnet.com/article/tower-operator-crown-castle-buys-lightower-fiber-networks-for-7-1-billion/ ("Crown Castle has been buying fiber providers in an effort to boost its fiber footprint."); Martha DeGrasse, *ExteNet to Buy Hudson Fiber from Tiger Infrastructure Partners*, Fierce Wireless (Jun. 4, 2018), available at https://www.fiercewireless.com/wireless/extenet-to-buy-hudson-fiber-from-tiger-infrastructure.

[52] *See Atlantic-ACM 2018-2023 Forecast* at 85.

[53] *See BDS Order*, 32 FCC Rcd at 3482 ¶ 44, 3498 ¶ 82.

IV. EX ANTE PRICING REGULATION OF TDM TRANSPORT IS UNNECESSARY AND WOULD BE COUNTERPRODUCTIVE.

As noted, demand for TDM transport has continued to slide in recent years, as DS1 and DS3 capacities have become increasingly obsolete in the current gigabit age. Thus, market and technological forces have obliterated any market power that price cap carriers once held in TDM transport.

In the *BDS Order*, the Commission acknowledged that a small percentage of census blocks with BDS demand might lack competitive transport, but it determined that competition is sufficiently widespread to protect against the risk of supracompetitive rates for price cap carriers' transport services in these areas over the short-to-medium term.[54] And, in any case, the risks of overregulation of these services would outweigh any marginal benefit from extending monopoly-era price cap and tariff regulations in this highly competitive sector, by artificially tamping down TDM transport rates, thereby deterring competitive entry and slowing the IP migration.[55] Such ex ante regulation also would impose "an additional layer of regulatory complexity[,]" undermining predictability and ultimately competitive entry and growth.[56]

The Commission thus reasonably concluded that retaining tariff and price cap regulation of price cap carriers' TDM transport services in any geographic area was unnecessary and would be counterproductive. The same is true today. This does not mean that these services will be unregulated. Price cap carriers will be required to offer these services on rates, terms, and conditions that are just, reasonable, and not unreasonably discriminatory.[57] If a price cap carrier

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[54] *BDS Order*, 32 FCC Rcd at 3501-02 ¶ 92.

[55] *Id.*, 32 FCC Rcd at 3501-02 ¶¶ 92-93.

[56] *Id.*, 32 FCC Rcd at 3502 ¶ 93.

[57] *See id.*, 32 FCC Rcd at 3506 ¶ 102 n.308, 3516 ¶ 124 n.382.

fails to comply with these requirements, BDS customers can seek redress through the Commission's Section 208 complaint process.[58]

V. CONCLUSION

For all these reasons, the Commission should adopt its proposal to not impose ex ante pricing regulation on price cap carriers' TDM transport services.

Respectfully submitted,

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[58] *See BDS Order*, 32 FCC Rcd at 3502 ¶ 93.